

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RICHARD HOLT)	
Claimant)	
)	
VS.)	
)	
DOHERTY ORNAMENTAL IRON, INC.)	
Respondent)	Docket No. 1,024,307
)	
AND)	
)	
BUILDERS ASSOC. SELF INSURERS)	
FUND OF KANSAS)	
Insurance Carrier)	

ORDER

Claimant requested review of the June 28, 2007 Award by Administrative Law Judge (ALJ) Robert H. Foerschler. The Board heard oral argument on October 2, 2007.

APPEARANCES

Michael W. Downing, of Kansas City, Missouri, appeared for the claimant. C. Anderson Russell, of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument claimant's counsel advised that he had filed his written fee agreement and asked that the Board approve a fee consistent with the terms contained within that agreement. Respondent had no objection to this request.

ISSUES

The Administrative Law Judge (ALJ) adopted the impairment ratings offered by Dr. Bruce Toby, one of claimant's treating physicians, and awarded the claimant a 6 percent impairment to the left upper extremity and a 11 percent to the right upper extremity for injuries sustained out of and in the course of employment with the respondent.¹

The claimant requests review of this Award, asserting that the Award does not fairly reflect claimant's true impairment. Claimant advocates a modification of the Award and suggests Dr. Koprivica's impairment ratings of 30 percent to the right upper extremity and 20 percent to the left² adequately address the severe and profound nature of claimant's injuries.

Respondent argues that the ALJ Award should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant suffered a compensable injury on May 20, 2005 when he fell 15 feet on to a concrete floor, sustaining bilateral fractures to his upper extremities. After his initial surgical treatment to repair the fractures, which included the installation of hardware, claimant began to experience numbness and other symptoms in his hands and arms. Following an EMG, claimant was diagnosed with severe bilateral carpal tunnel syndrome.

Claimant was referred to Dr. Bruce Toby who recommended bilateral endoscopic surgery to address the carpal tunnel complaints. He also suggested that the hardware in claimant's wrists be removed. The recommended surgery was first performed to the right arm (on January 10, 2006) and then on the left (March 7, 2006). Following his recovery, claimant completed a functional capacities evaluation which led to permanent restrictions.

Claimant has continued to work for respondent, within his restrictions, but he continues to experience aches and pains, numbness, swelling in the knuckles and wrists, a bilateral lack of grip strength and he must wear wrist braces while working.

Dr. Toby rated claimant's permanent impairment at 6 percent to the left upper extremity and 11 percent to the right. He assigned these figures based upon the claimant's

¹ Both of these ratings were to the forearm level, 200 weeks, under K.S.A. 44-510d.

² Both of these ratings were to the shoulder lever, 225 weeks, under K.S.A. 44-510d.

diminished range of motion and then added additional points for the carpal tunnel surgery.³

Coincidentally, Dr. Toby had treated claimant for an earlier work-related injury to his right hand. In that accident, claimant hyperextended his index and his long fingers. During the course of his treatment, Dr. Toby identified degenerative arthropathy of the MCP joints in claimant's right hand which predated the accident. Claimant was treated with conservative physical therapy and taken off work for a significant period of time. Eventually he was released from treatment, but the physical therapist recommended he not return to iron work. Nonetheless, claimant did so and worked without incident, albeit with some pain and swelling in his right hand, until May of 2005.

At his lawyer's request claimant was evaluated by Dr. P. Brent Koprivica on October 6, 2006. According to Dr. Koprivica, the claimant fractured both wrists essentially destroying the wrist joints which were then surgically reconstructed. Thereafter, claimant developed entrapment of the median nerve, both of which required surgical procedures. The doctor noted that the claimant had a significant loss of strength bilaterally in both extremities, and had a loss of dexterity and a loss of dorsiflexion of the wrists, with limited ability to radial or ulnar deviation of the wrist which severely impacts the claimant's ability to lift and carry. Dr. Koprivica assigned the following impairment ratings: 30 percent permanent partial impairment to the right upper extremity as well as a 20 percent to the left upper extremity. Dr. Koprivica was asked what his ratings would be if they were just to the hand and not at the upper extremity level, and he responded that the right hand impairment would be 33 percent while the left would be 22 percent.

After considering both physicians' testimony, the ALJ adopted the opinions of Dr. Toby reasoning that "[d]ue to the time he treated and followed [c]laimant and his more active involvement in clinical treatment, the opinion of Dr. Toby is considered more persuasive . . ."⁴ Thus, he awarded claimant the 11 percent and 6 percent.

The Board has considered the entire record as well as the parties written and oral arguments and concludes that there is no discernable reason to adopt one physicians' opinion over another. Consequently, the Board believes that claimant's true impairment lies somewhere in between the two. The Board will therefore average the impairment opinions of both physicians. Thus, the Award is modified to grant claimant a 22 percent permanent partial impairment to the right upper extremity at the 200 week level and a 14 percent to the left upper extremity, again at the 200 week level.

³ This was the explanation offered during Dr. Toby's deposition, although he only explained how he arrived at his rating for the left upper extremity. It is somewhat unclear from the record if this was the same methodology he used on the right. Toby Depo. at 27-30.

⁴ ALJ Award (June 28, 2007) at 5.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated June 28, 2007, is modified as follows:

RIGHT FOREARM

The claimant is entitled to 17.75 weeks of temporary total disability compensation at the rate of \$449.00 per week in the amount of \$7,969.75 followed by 40.10 weeks of permanent partial disability compensation, at the rate of \$449.00 per week, in the amount of \$18,004.90 for a 22 percent loss of use of the right forearm, making a total award of \$25,974.65.

LEFT FOREARM

The claimant is entitled to 17.75 weeks of temporary total disability compensation at the rate of \$449.00 per week in the amount of \$7,969.75 followed by 25.52 weeks of permanent partial disability compensation, at the rate of \$449.00 per week, in the amount of \$11,458.48 for a 14 percent loss of use of the left forearm, making a total award of \$19,428.23.

Pursuant to the parties' agreement, claimant's attorney is entitled to a fee consistent with the terms of the agreement which was filed with the Division insofar as that agreement is consistent with the Act.

Dated this _____ day of November, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael W. Downing, Attorney for Claimant
C. Anderson Russell, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge